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VIA HAND DELIVERY

Federal Communications Commission  
Office of Secretary

February 5, 2003

ORIGINAL

EX PARTE

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, D.C. 20554

Re: Oral **Ex Parte** Presentation  
CC Docket Nos. 01-338 and 02-33

Dear Ms. Dortch,

On February 5, 2003, Steven Teplitz, Vice President and Associate General Counsel, AOL Time Warner Inc. ("AOL"), Donna Lampert and the undersigned, both of Lampert & O'Connor, P.C., held a telephone conference with Christopher Libertelli, Legal Advisor to Chairman Powell.

During the discussion, we urged the Commission to reject arguments that the UNE Triennial Review provides an opportunity to address larger broadband issues properly before the Commission in other proceedings. In addition, we encouraged the Commission to continue its efforts to foster broadband telecommunications service competition. The specific points discussed during the meeting are contained on the attached presentation outline.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, two copies of this letter are being provided to you for inclusion in the public record of each of the above-captioned proceedings. Should you have any questions, please do not hesitate to contact me.

Sincerely,  
  
Linda L. Kent  
Counsel for AOL Time Warner Inc

Attachment

cc: Christopher Libertelli

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**The FCC Should Reject Arguments That UNE Triennial Presents Opportunity For FCC To Address Larger Broadband Issues (Including Wireline Broadband)**

- Recent position change by some BOCs urging that the FCC look at *services* instead of *elements* and urging FCC deregulation and elimination of unbundling requirements for broadband services is unsupported by all FCC record evidence, ignores statutory requirements and would create further uncertainty for information services competitors and customers.
  - Proffered analysis ignores legal requirements and FCC precedent – issue in Triennial Review is whether and how FCC promotes CLEC/DLEC broadband service competition through UNEs based upon its analysis of 251, which is separate from whether and how FCC promotes ISP (information services) competition
    - Test For UNEs is whether CLEC would be impaired in providing services, including voice and “broadband” telecom service
      - FCC has already stated that “advanced services” are legally indistinguishable from other telecom services for 251 purposes
      - The proposed move away from network elements to proposed broad service definition is unlawful and opens the door to BOC anticompetitive behavior
    - Parties who urge FCC now look at services in UNE Triennial are conflating issues regarding market dominance and FCC’s pricing flexibility standard with the statutory standard in 251, seeking to push the FCC to decide their entire wish-list of “deregulatory issues” in UNE Triennial
      - FCC should stick to the record in this proceeding and decide other issues using records in those proceedings
- The FCC should not define markets in UNE Triennial in a manner that would pre-judge extant issues in other proceedings
  - Invoking cable and wireline broadband issues and facts in UNE Triennial is only compounding confusion between telecom services and information services and various requirements (e.g., TELRIC not an issue at all for ISP “unbundling”)
    - In contrast to CLECs, ISPs use ILEC telecommunications *services* (DSL transmission services, ATM, frame relay) not *UNEs* for their provision of information services to public, pursuant to Sections 201 and 202 of the Act and the FCC’s *Computer Inquiry* rules.
    - Service analysis would have detrimental impact on ISPs by subjecting availability of broadband services to impairment analysis, which is not legally required, and by eliminating BOC competitor access to broadband transmission services.



- o Moreover, requests that FCC address cable telephony (and other IP telephony issues) in context of UNE Triennial should be rejected – would serve only to expand regulatory uncertainty, complexity and increase competitors' hurdles
- While recognizing Court's directives in *USTA v. FCC*, FCC should note that cable modem availability is not relevant to the statutory analysis required in this proceeding
  - o FCC appropriately is considering issues related to cable modem service and broadband information services (and the legal and policy implications) in other proceedings
  - o FCC should not address classification of broadband transmission services used by ISPs in UNE Triennial other than to recognize that both CLECs and ILECs are competitors selling wholesale telecommunications services to ISPs

### **The FCC Should Continue to Foster Broadband Telecom Service Competition**

- For UNE Triennial, FCC must ask whether CLECs would be impaired without UNEs for line sharing and all data indicate "yes"
  - o Record demonstrates that ILEC DSL roll-out is direct response to competitive pressures – CLECs serve to drive down prices and improve services by ILECs, thereby benefiting customers.
  - o CLECs have little chance of being viable alternative source of DSL without access to UNEs and line sharing
- Further, not only are ILECs today the primary providers of wholesale DSL transmission services used by ISPs (ILECs provide over 95% of DSL services), elimination of CLECs/DLECs would leave BOC as the only place for ISPs to obtain wholesale broadband transmission.
  - o Significant risk of BOC anticompetitive behavior in provision of wholesale DSL transmission given lack of competition
  - o FCC must maintain Sections 201, 202 of Act and core principle of *Computer Inquiry* that requires BOCs to provide stand-alone broadband transmission on nondiscriminatory basis.
- At a minimum, any change in UNE requirements or line sharing that impact CLEC provision of services to ISPs must include transition period sufficient for ISPs to alter business plans and/or enter into contracts with new suppliers if necessary.
  - o FCC must specify length of transition and what rules will apply during transition. If state-by-state, FCC should set timeline for state determinations that alter current UNEs to reduce uncertainty for CLEC customers.